IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICAN *f/u/b/o*
MODERN MOSAIC, LTD.

Plaintiff,

Civil Action No.: 1:16-CV-00012
(Hon. Frederick P. Stamp, Jr. Senior Judge)

v.

TURNER CONSTRUCTION COMPANY,
***et al.*,**

Defendants.

BENCH TRIAL MEMORANDUM OF PLAINTIFF, MODERN MOSAIC, LTD.

COMES NOW Plaintiff, Modern Mosaic, LTD. ("Modern"), and respectfully submits this memorandum in support of its case against Defendants Turner Construction Company ("Turner"), Travelers Casualty and Surety Company of America ("Travelers"), Federal Insurance Company ("Federal"), Fidelity & Deposit Company of Maryland ("Fidelity"), Liberty Mutual Insurance Company ("Liberty") and The Continental Insurance Company ("Continental") and in support of its Findings of Facts and Conclusions of Law.

I. FACTS

On or about May 22, 2011, Turner, the general contractor, and Modern entered into a written subcontract wherein Modern was to fabricate and install precast concrete panels for the project known as the Biometric Technology Center, New Office Building and Central Utilities Plan Expansion located on the premises at the FBI CJIS Division Complex in Clarksburg, West Virginia. *Ex. A*.

Modern Mosaic manufactures and erects precast concrete. Precast concrete panels are what a person can see when looking at the outside of a building. Precast concrete has different colors, sizes, shapes and textures and can give a rich architectural appearance to a structure.

Forlenza Aff. at ¶ 4. Precast concrete is manufactured at Modern's plant in Niagara Falls, Ontario, Canada. Precast concrete is made, generally speaking, by combining the different elements of the required concrete mix into a batch at the plant, pouring the concrete into forms and letting the concrete cure. The concrete is then removed from the forms and a number of different types of finishes are applied until a final product is reached. The product is then stored at Modern's facility in Niagara Falls, Ontario, and/or shipped to a construction project in the United States, such as the project underlying this litigation. *Forlenza Aff.* at ¶ 5.

Precast concrete is attached to a building by way of embeds which are put into the structural steel and/or concrete structure and are attached to anchors and other devices that are mounted into the precast panel. The embeds are pieces of metal to which the precast panels attach. The embeds are typically supplied by Modern but installed or manufactured by other concrete subcontractors. The precast is then mounted by attaching to those embeds. *Forlenza Aff.* at ¶ 6.

Modern Mosaic has three claims in litigation against Turner Construction. The parking garage claim was dismissed upon Turner's partial summary judgment motion. The other two claims referred to as the "Supervisory Surveillance" claim and the "Landscape" claim are the subject of the subject bench trial. *Forlenza Aff.* at ¶ 7. The "Supervisory Surveillance" claim relates to a requirement that Modern Mosaic provide full-time inspection on the project. *Forlenza Aff.* at ¶ 9. The "Landscape" claim relates to a soil condition problem that Turner had on the project. That claim involved Modern's manufacturing and installation of portions of precast concrete into the landscaping portion of the project. Due to a soil condition, which was not the responsibility of Modern, movement occurred to the concrete structures prior to erecting the landscape precast. That movement caused damage to the structures. As a result, Turner had to adjust the concrete structures. *Forlenza Aff.* at ¶ 10.

During the course of the project and as part of Modern's base contract scope of work, Modern manufactured and installed 336 precast units which were set throughout the site of the project. These are precast units which were not manufactured for or installed upon any structure, but upon stand-alone concrete walls. These concrete walls were set into the site of the project for ornamental and soil control issues. *Forlenza Aff.* ¶ 33. See also *Claessen Aff.* at ¶ 7. Upon the completion of the structural landscape walls Modern and its subcontractor measured these walls and incorporated these as built dimensions into their shop drawings which were approved by Turner. *Elia Aff.* at ¶ 4. Modern performed this scope of work in full and its work was fully accepted by Turner. The problem, however, arose as a result of soil conditions. *Forlenza Aff.* at ¶ 34.

The soils were not properly prepared by Turner's site work contractor. That site work contractor had the responsibility to prepare compact soils so that those soils would be able to support the work that followed. *Forlenza Aff.* at ¶ 35 and *Ex. H*. Modern was contacted by Turner regarding this situation. Turner's Robert Hennessey informed Modern's Mario Forlenza that the soil contractor made mistakes in the compaction of the soil. As a result of those mistakes, the soil did not properly support the precast. *Forlenza Aff.* at ¶ 36.

Modern and its subcontractor began installation of the precast panels on the landscape cast in place concrete walls in July 2013. *Elia Aff.* at ¶ 6. Modern and Old Dominion continued installing precast panels on the non-affected walls until the first week in November 2013 when they were directed by Turner Construction to stop installation, stating that there was a problem with the soil which was causing the remaining cast-in-place concrete walls to sink and lean. *Claessen Aff.* at ¶ 7.

Old Dominion had installed 226 panels of the 336 that were to be erected on the concrete walls when Old Dominion and Modern were told to cease installation because of the soil problem. *Claessen Aff.* at ¶ 8. Old Dominion and Modern were not permitted to resume installation of the remaining panels until September 2014, at which time Old Dominion and Modern were informed that the soil problem had been addressed, and the remaining areas were ready for precast installation. *Claessen Aff.* at ¶ 9. In September 2014, Modern and Old Dominion remobilized to the project site and began installation of the remaining 110 precast panels. *Claessen Aff.* at ¶ 10.

However, when Old Dominion got to the project site it noticed many of the concrete walls were still leaning. Turner instructed Modern and Old Dominion to make the panels fit on the concrete walls as currently built. *Claessen Aff.* at ¶ 11 and *Elia Aff.* at ¶¶ 18-19. Numerous panels had to be remediated by either shaving the thickness down or cutting the length to fit the current as-built conditions. *Claessen Aff.* at ¶ 12; *Elia Aff.* at ¶ 19; *Ex. H*. The connections also had to be retooled, as the original connections no longer worked because they were based on walls being perfectly vertical (within tolerance) as shown on the original approved plans. The walls were no longer straight; they were leaning because of the soil. *Claessen Aff.* at ¶ 13; *Elia Aff.* at ¶ 19.

Mr. Hennessey informed Modern's Mario Forlenza that Turner had insurance to cover these additional costs. *Forlenza Aff.* at ¶ 40. He, therefore, worked closely with Modern's Stephanie Golia and Mario Forlenza and directed Modern how to allocate its costs for this claim between other claims on the project, in particular, Modern's claim with regard to additional costs arising out of existing conditions at the parking garage. *Forlenza Aff.* at ¶ 41. Mr. Hennessey directed Modern to prepare and present its damages for this claim in a fashion that would assist Turner in recovering money for the claim from its subcontractor and the insurance company. *Forlenza Aff.* at ¶ 43. Modern never received any information from the insurance company. Further, Turner and Turner's subcontractor have never disclosed any information in any detail with regard to that insurance or how much of Modern's claim was submitted to that insurance carrier or subcontractor or how much money was paid to Turner or withheld by Turner from its subcontractor. *Forlenza Aff.* at ¶¶ 46-47.

As instructed by Turner, Modern remediated and retrofitted 110 precast units. These units were prepared at the request of Turner to fit the new out of spec cast in place concrete walls. *Elia Aff.* at ¶¶ 7, 18-19. Mr. Hennessey assured Modern that it would be reimbursed for these costs which were Turner's responsibility through Turner's subcontractor's failure. *Forlenza Aff.* at ¶ 52.

In accordance with Turner's instructions, Modern prepared and presented to Turner costs and a claim reflecting this additional manufacturing and additional installation in the amount of $176,090.00. The costs were submitted to Turner by way of Modern's Contract Revision No. 12 Revised dated July 21, 2015. *Ex. I*. Turner never objected to these costs but informed Modern that it would be paid in due course. *Forlenza Aff.* at ¶ 45.

Turner admits that it submitted these claims to Turner's "builders risk carrier" without identifying the carrier and without providing any documentation indicating what costs Turner submitted to the subcontractor, the carrier or what the carrier paid Turner or Turner withheld from its subcontractor. *Ex. P*. There is nothing in Modern's contract with Turner indicating that Modern is in any way limited by the amounts of money that Turner might happen to recover from its "builders risk carrier" or its other subcontractor in payment to Modern. *Ex. A*. Turner admits that it offered Modern $61,000.00 against Modern's claim of $176,090.00 and Modern justifiably rejected that paltry settlement proposal. *Ex. P* and *Forlenza Aff.* at ¶ 48. The tragic coincidence here is that Modern prepared and submitted its costs in accordance with Turner's directions and those costs were in the amount of $176,090.00. Turner, without providing any information or proof to Modern, offered only $61,000.00, claiming that is all it received from its insurance carrier with no mention of what they withheld from Turner's subcontractor. *Forlenza Aff.* at ¶ 47.

Article IX of the subcontract restricts recovery to what Turner recovered from the owner. *Ex. A*. Article IX does not apply in this case because Turner recovered from its insurance company not the owner. *Forlenza Aff.* at ¶¶ 50 and 51. Modern did not in any subcontract agree to be restricted to what Turner claims it recovered from its insurance company for losses, or what it withheld or recovered from its other subcontractor. Modern performed the work as directed by Turner. The remediation and retrofit of those panels were done at great cost to Modern Mosaic. The costs were submitted and not rejected by Turner. *Forlenza Aff.* ¶¶ 47-51; *Ex. A*, Article IX.

The submission by Modern to Turner of contract revision No. 12 revised includes detailed cost and pricing information which was assembled and presented as directed by Turner. Turner now tries to avoid its responsibilities to its subcontractor, Modern, for these costs. Not only can Turner recover these costs from its "builders risk carrier," but Turner can also recover these costs from its subcontractor. These costs are the responsibility of Turner. Modern manufactured new precast and installed that precast at the direction of Turner. All of that work was accepted by Turner. That precast and that installation is in place on the project and Turner has been paid for those costs. *Forlenza Aff.* at ¶ 55.

The components of Modern's claim include manufacturing, panel storage costs ($62,263.14), additional cleaning costs for the panel in storage ($3,500.00), costs of administration and overhead ($40,257.00), costs for loading and delivering the panels ($11,814) and the installation costs ($37,303.93). *Ex. I*. The Remediation and retrofit installation costs of $37,303.93 were incurred by Modern's erector, Old Dominion Erectors Inc., the payment for which was Modern's responsibility. This is part of the claim submitted to Turner for which Turner admits responsibility. *Forlenza Aff.*, at ¶ 56(D); see also *Claessen Aff.*, ¶¶ 11-14; *Ex. N*. The Panel Storage in the amount of $62,263.14 is for the storage at Modern's plant in Niagara Falls, Ontario as well as storage at the project site of 5,200 feet of precast panels while the landscape issue was being fixed. *Forlenza Aff.* ¶ 56(A) and *Ex. J*.

Due to the panels sitting in Modern's yard for 15 months, the panels had to have an extra scrub down at a cost of $3,500.00 at the facility prior to shipping to the site. *Forlenza Aff.* ¶ 56(B); *Exs. J and K*; *Elia Aff.* at ¶ 13. The additional overhead and costs incurred in the amount of $40,257.00 reflects plant and management costs incurred by Modern. Ex. *I*. In November 2013 when the installation was suspended by Turner there were still 110 precast panels on site to be installed. These 110 panels had to be loaded onto multiple trucks, transported back to Modern's facility for storage and unloaded. In October 2014, when Modern was ordered to resume installation of these 110 panels, the panels had to be loaded onto multiple trucks, transported back to the project site and be unloaded for installation. The almost one year suspension of work resulted in 55 additional truckloads of precast panels being shipped to and from the project site at a cost of $214.80 per load, totaling $11,814.00. *Ex. L*; *Ex. I*; *Forlenza Aff.* at ¶ 56(C).

The subcontract at page AP-3 under the paragraph titled Alternates, states:

> Pursuant to Article XV of this agreement, the following Alternate(s) and or Unit Price (s) may be accepted by Contractor at its sole discretion. If so exercised it will be confirmed by written change order to this Subcontract. "No Change modifications do require a change order. **The Alternate and Unit Prices noted herein are not part of the lump sum Contract Price reflected in Article IV**. Inasmuch as these Alternates (s) and/or Unit Prices were anticipated from the inception of the project and were priced accordingly these unit prices include ALL items of cost including, but not limited to, labor, materials, equipment, tools, supervision, jobsite and home office overhead, insurance, taxes profit, bonds and escalation as necessary to prosecute the work. All alternates and unit prices which shall remain firm throughout the duration of the project, unless specifically noted herein. Applicable quantities shall be based upon either (1) agreed upon estimates, or (2) actual measured in-place work. The net change to the subcontract price, increased or decreased, shall represent net change to quantity multiplied by the applicable unit price.
>
> 1. Option #1 ……………………… Not Exercised.
> 2. Licensed Land Surveyor or Professional Engineer to oversee precast installation ------ Add $68,000.00

Ex. A (Emphasis added); *Forlenza Aff.* at ¶ 13.

As stated in the contract, the cost of a full-time licensed professional engineer or surveyor was not part of Modern Mosaic's scope of work nor included in the lump sum contract price. *Forlenza Aff.* at ¶ 14. What this requires is someone to monitor and oversee the installation of precast. This does not call for full-time monitoring. *Forlenza Aff.* at ¶ 15. The precast specification 034500 does not contain any requirement for a full-time inspector or "surveillance" during the installation of the precast. *Ex. C.* Turner points to a specification in a different section, specifically, Specification Section 033000 Cast In Place Concrete, as the basis for the position that the precast subcontractor (Modern Mosaic did not perform the cast in place) must provide full-time "supervisory surveillance" or monitoring during every day and every hour of installation of the precast concrete. *Ex. B.* Specification Section 033000 Cast In Place Concrete includes the following requirement for cast in place concrete:

> 3.9 FIELD QUALITY CONTROL MONITORING
>
> A. Contractor's Responsibilities: The following activities shall be performed by the Contractor's Independent Inspection and Testing Agency.
>
> B. Monitoring of Concrete Placement: **Continuously observe concrete placement operations on a full-time basis**, record such observations on a daily basis, and submit reports of the results.

(Emphasis added).

This requirement is not in the precast specification (Section 034500). *Ex. C* and *Forlenza Aff.* at ¶ 15. Specification 033000 is for "flatwork" which is cast in place concrete typically used for slabs, slab on grade, slab on deck. Section 033000 is for formed then poured concrete. Precast is not flatwork. *Forlenza Aff. Footnote 1* and *Ex. B.* Precast is governed by a completely different specification which is specification Section 034500. Specification 034500 states the following with regard to "field quality control":

> 3.8 FIELD QUALITY CONTROL
>
> A. Contractor's Quality Control Responsibilities: Contractor is solely responsible for quality control of the Work.
>
> B. Erection under supervisory surveillance of a Professional Engineer or Licensed Land Surveyor engaged by the Contractor who shall certify that erected units are within the specified tolerance limits.
>
> C. The engineer or surveyor shall check for compliance with these requirements by using the Transit and Tape Method or City Surveying meeting criteria of United States Coast and geodetic Survey for Surveying / Class 3 (Third Order).

Ex. C and Forlenza Aff. at ¶ 17.

Specification 34500 is the scope of work between Modern and Turner reflecting the need to have a certain amount of project quality control on site during the erection of the precast that Modern manufactures and installs. *Ex. C*. This specification forms Modern's agreement and Modern's scope of work with Turner. *Forlenza Aff.* at ¶ 16. During the course of the project Turner directed Modern to have a full-time onsite inspector. *Forlenza Aff.* at ¶ 18. This responsibility is required of the flatwork or cast-in-place concrete subcontractor, which was not Modern. *Ex. B* and *Forlenza Aff.* at ¶ 19. Modern performed work under Division 34500, not 33000, of the specification. *Forlenza Aff.* at ¶ 16.

During the course of the project Turner requested the performance of the requirements of Alternate No. 2, the provision of someone to oversee precast installation. Oversight of precast installation is much different than the full-time, day-to-day, hour-to-hour and minute-to-minute monitoring of precast installation. Modern provided a professional licensed land surveyor who oversaw the installation of precast as required by the project on a part-time basis. That individual was there two days per week for about four hours each day. Modern retained Thrasher Engineering Inc. to provide that individual. After Modern began performance of its work and after Thrasher Engineering was at the project site performing a customary and traditional amount of "oversight" during installation, Turner directed that Modern provide full-time monitoring of that installation. *Forlenza Aff.* at ¶ 18.

Clearly the cast-in-place subcontractor, which was not Modern, had an obligation to provide full-time onsite inspection. *Ex. B*; *Forlenza Aff.*, at ¶ 15 and *Elia Aff.* at ¶ 23. Nonetheless, Turner directed Modern to provide this additional work. The Aff. of Mario Forlenza includes Modern's contract revisions 2, 7 and 8 which are transmitted under the transmittal dated June 12, 2014. *Exs. E and F*. Turner directed Modern to provide continuous full-time observation of the installation of the precast. *Forlenza Aff.* at ¶ 18. Turner confused this with the obligations of the flatwork or cast-in-place subcontractor's responsibilities which required "such observations on a daily basis." Specification Section 33000, 3.9B at *Ex. B*; *Forlenza Aff.* at ¶¶ 19 and 20; *Elia Aff.* at ¶ 24. Costs incurred by Modern to pay Thrasher, together with Modern's contractually approved markup for overhead and profit totals $112,969.00 plus interest. *Forlenza Aff.* ¶22; *Exs. D, E and F*.

Turner has raised the fact that they invoked Alternate Option B and paid Modern Mosaic $68,000.00. Turner did pay Modern Mosaic $68,000.00 under option B. The $112,969.00 being claimed in change revisions 2, 7, and 8 is for additional extra work above the $68,000.00. *Forlenza Aff.* at ¶ 25. Turner asked that Modern present this claim to the construction owner, the Federal Bureau of Investigation and the U.S. Government. Modern agreed to do so and presented the claim to the Civilian Board of Contract Appeals in Washington, D.C. *Ex. Q*. Modern's attorney's Aff. identifies discussion regarding these procedures and the submission of the claim. However, merely days before that case was to go to trial, Turner withdrew that appeal without consent or participation of Modern. *Ex. R*. Turner claimed it did so because it settled its claims with the Government. *Edward J. Sheats, Esq. Aff.* at ¶¶ 5-7. Turner required that in the event Modern had a claim for additional compensation, the claim be the responsibility of the owner, here the FBI, then Turner is to submit that claim to the owner for determination. *Forlenza Aff.* at ¶ 29.

Article XXXIII reads in part:

> It is expressly understood that any right of the Subcontractor to receive any payment under the Subcontract shall be co-extensive with Contractor's right to receive reimbursement for such payment under the Primary Subcontract, as determined in accordance with decisions and determinations that are binding upon Contractor, and Subcontract expressly waives any claim to any payment in excess

> thereof or on a basis for payment different from the foregoing, including but not limited to any contrary rights arising under 40 USC 270a and/or 270b.

Ex. A. Turner settled with the FBI and accepted $23,800,000.00 in settlement for all of its claims. *Ex. M*. However, what Turner did not do, but ought to have done and could have done, was request that the final settlement change order identify and itemize all of the subcontractor claims that were being settled and resolved. *Forlenza Aff.* at ¶ 31.

Under Article XXXIII of the subcontract, Turner had an obligation to ascertain and identify the subcontractor claims as they were being settled with the government, to the extent that Turner's position is that those claims are the responsibility of the government. *Forlenza Aff.* at ¶ 32. Turner deliberately did not include an itemization in the lump sum single item change order with the government. This was clearly done so that Turner for its own purposes could obscure the amount of money that it owed to its subcontractors. *Forlenza Aff.* at ¶ 32. Turner put itself in a position where it could claim that all, some or none of the subcontractor claims are in this resolution thereby defeating the very intent and purpose of Article XXXIII of the subcontract.

II. ARUGMENT

A. Supervisory Surveillance Claim:

The supervisory surveillance claim is a claim by Modern to be paid for the cost Modern had to incur providing a full-time licensed surveyor or monitor during the installation of the precast panels. This is a simple claim to be compensated for extra work performed outside the scope of the contract.

Article XV of the contract allows a subcontractor to submit a claim for extra work. A subcontractor seeking a change in price for extra or change order work shall submit a change order proposal, which shall include a price breakdown with supporting data/documentation. *Ex. A at p. 4*. Modern complied with Article XV of the subcontract and submitted written contract revisions 2, 7 and 8 for the cost of the full-time surveyor. *Exs. E and F*. Turner breached the contract by refusing to pay Modern for the cost of the full-time surveyor. *Forlenza Aff. ¶ 28*. Turner is going to raise the fact they issued a change order enacting option 2 under the Alternates of the subcontract and that option 2 required Modern to employ a full-time surveyor. However, that is not the case.

Option 2 under Alternates in the subcontract states:

> Pursuant to Article XV of this agreement, the following Alternate(s) and or Unit Price (s) may be accepted by Contractor at its sole discretion. If so exercised it will be confirmed by written change order to this Subcontract. "No Change modifications do require a change order. **The Alternate and Unit Prices noted herein are not part of the lump sum Contract Price reflected in Article IV**. Inasmuch as these Alternates (s) and/or Unit Prices were anticipated from the inception of the project and were priced accordingly these unit prices include ALL items of cost including, but not limited to, labor, materials, equipment, tools, supervision, jobsite and home office overhead, insurance, taxes profit, bonds and escalation as necessary to prosecute the work. All alternates and unit prices which shall remain firm throughout the duration of the project, unless specifically noted herein. Applicable quantities shall be based upon either (1) agreed upon estimates, or (2) actual measured in-place work. The net change to the subcontract price, increased or decreased, shall represent net change to quantity multiplied by the applicable unit price.
>
> 3. Option #1 ……………………… Not Exercised.
> 4. Licensed Land Surveyor or Professional Engineer to oversee precast installation ------ Add $68,000.00

(Emphasis added). What the above option No. 2 requires is someone to monitor and oversee the installation of precast. This does not call for full-time monitoring. Oversight of precast installation is much different than the full-time monitoring of precast installation.

Modern's scope of work, which was governed by precast specification 034500, further supports the fact that Modern's contract did not call for full-time monitoring of the precast installation. *Forlenza Aff. ¶ 17; Ex. C.* Precast Specification 034500 does not contain any requirement for **full-time** monitoring during the installation of precast. Precast Specification 034500 states the following with regard to "field quality control":

> 3.8 FIELD QUALITY CONTROL
>
> A. Contractor's Quality Control Responsibilities: Contractor is solely responsible for quality control of the Work.
>
> B. Erection under supervisory surveillance of a Professional Engineer or Licensed Land Surveyor engaged by the Contractor who shall certify that erected units are within the specified tolerance limits.
>
> C. The engineer or surveyor shall check for compliance with these requirements by using the Transit and Tape Method or City Surveying meeting criteria of United States Coast and geodetic Survey for Surveying / Class 3 (Third Order).

Ex. C.

Nowhere does precast specification 034500 require full-time surveillance. This is in contrast to the requirements for the cast in place concrete subcontractor. Modern was not the cast in place concrete subcontractor. Cast in place concrete specification 033300 states the following with regard to "field quality control":

> 3.9 FIELD QUALITY CONTROL MONITORING
>
> A. Contractor's Responsibilities: The following activities shall be performed by the Contractor's Independent Inspection and Testing Agency.
>
> B. Monitoring of Concrete Placement: **Continuously observe concrete placement operations on a full-time basis**, record such observations on a daily basis, and submit reports of the results.

Ex. B. (Emphasis added).

During the course of the project Turner requested the performance of the requirements of Alternate No. 2, someone to oversee precast installation. *Forlenzo Aff. ¶ 18.* Upon this option being enacted, Modern provided a professional licensed land surveyor who oversaw the installation of precast as required by the project on a part-time basis. *Id.* That individual was there two days per week for about four hours each day. *Id.* That level of oversight was customary and in line with Modern's contract.

However, after Modern began performance of the installation of the precast and after Thrasher Engineering was at the project site performing a customary and traditional amount of "oversight" during installation, Turner directed that Modern provide full-time monitoring of that installation, as opposed to oversight of the precast installation, contrary to the terms of the contract and scope of work specification 034500. *Id.* Turner incorrectly referred to a specification in a different section, specifically specification Section 033000 Cast In Place Concrete, as the basis for the position that the precast subcontractor, Modern, was to provide (full-time) monitoring.

The contract clearly shows that Modern was not required to provide full-time monitoring of the precast installation and should be enforced according to such intent. *Exs. A and C.* A "valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *New v. GameStop, Inc.*, 753 S.E.2d 62, 72 (W.Va. 2013). If the contract is clear on its face and not ambiguous, then the court should enforce its terms according to the plain meaning of the language used. *Covol Fuels No. 4, LLC v. Pinnacle Mining Co., LLC*, 785 F.3d 104, 112 (4th Cir. 2015).

In this case the contract is clear and unambiguous. The contract does not require Modern to provide full-time monitoring of the precast installation. Therefore, Turner's demand that Modern provide full-time monitoring was in breach of the contract and outside the scope of Modern's work. The cost incurred by Modern to Thrasher for full-time monitoring of the installation of precast is extra work for which Modern expected to be paid and properly submitted contract revisions. *Contract Revisions 2, 7 and 8 at Exs. E and F.*

The language of Alternate Option B does not cover the cost for a full-time monitor/surveyor, as the hiring of a full-time monitor/surveyor was never contemplated. The $68,000.00 Modern received under Alternate Option B did not cover the full-time monitoring of the installation. The $112,969.00 submitted by Modern in contract revisions 2, 7 and 8 is in addition to the $68,000.00 and is fully supported by the invoices from Thrasher to Modern for this work. *Ex. D.*

Furthermore, under the contract, Turner required that in the event Modern had a claim for additional compensation, then should the claim be the responsibility of the owner, here the FBI, then Turner was to submit that claim to the owner for determination. Throughout the course of this matter, Turner has taken the position that this supervisory surveillance claim is the responsibility of the FBI. Turner presented Modern's claim to the FBI and settled Modern's claim along with other subcontractor claims. Modern does not necessarily consent to the defense that its claim was the responsibility of the FBI as it appears Turner seriously mismanaged many portions of this project and may by itself, together with its sureties, be solely responsible for the claim. However, Turner did make the representation to the FBI that this claim was the FBI's responsibility. In fact, this claim was to be presented before the Civilian Board Contract Appeals

("CBCA"). *Ex. Q.* However, two days before the trial was to begin, Turner unilaterally discontinued the matter before the CBCA. *Sheats Aff. ¶ 5 and Ex. R.*

Modern learned that Turner had settled the case with the government for $23,800,000.00. *Ex. M.* However, Turner did not request that the final settlement change order identify and itemize all of the subcontractor claims that were being settled and resolved. *Sheats Aff. ¶ 7; Forlenza Aff. ¶ 31.* Under Article XXXIII of the subcontract, Turner has an obligation to ascertain and identify the subcontractor claims as they are being settled with the government, to the extent that Turner's position is that those claims are the responsibility of the government. *Ex. A, Article XXXIII; Forlenza Aff. ¶ 32.* Turner took the position that Modern's claims were the responsibility of the government, yet Turner did not include specific amounts for any subcontractor including Modern Mosaic. As Turner has received $23,800,000.00, which includes money that it earned off the backs of its unpaid subcontractors, it is inappropriate and a breach of contract for Turner not to comply with the provisions of Article XXXIII of the subcontract and Turner should be estopped from denying the settlement covered Modern's supervisory surveillance change orders and estopped from denying it owes money to Modern for contract revision 2, 7 and 8.

Turner owes Modern $112,969.00 plus interest for the extra work it performed in providing a full-time licensed surveyor.

B. Landscape Claim

The "Landscape" claim relates to a soil condition problem that Turner had on the project. That claim involved Modern manufacturing and installing portions of precast concrete into the landscaping portion of the project. Due to a soil condition, which was not the responsibility of Modern, movement occurred to the concrete structures prior to erecting the landscape precast. That movement caused damage to the structures. As a result, Turner had to adjust the concrete structures, which rescheduled installation of the landscape precast by almost one year, and Modern had to remediate and retrofit some of the precast panels to fit the corrected concrete structures. This is extra work Modern had to perform because of Turner and its site contractor's failure to properly compact the soil.

During the course of the project and as part of Modern's base contract scope of work, Modern manufactured and installed 336 precast units which were set throughout the site of the project. These are precast units which were not manufactured for or installed upon any structure. The precast panels were set onto existing stand-alone cast-in-place concrete walls set throughout the project site. They were set into the site of the project for ornamental and soil control issues. *Forlenzo Aff. ¶ 13.*

Upon the completion of the structural landscape walls, Modern measured the walls and incorporated those as built measurements into its shop drawings which were approved. Upon approval of the shop drawings, Modern fabricated the precast panels for the landscape walls. *Elia Aff. ¶ 4.* Modern began installation of the precast panels on the landscape concrete walls in July 2013. Modern's subcontractor installed 226 precast panels but was unable to install the last 110 panels because the cast in place concrete walls had moved and were leaning. *Elia Aff. ¶¶ 4-6.*

Turner's Robert Hennessy informed Modern that the soils were not properly prepared by Turner's site work contractor, and, thus, the soils could not support the concrete walls and precast. *Elia Aff. ¶ 8.* In November 2013, Turner ordered Modern to stop installation of the precast panels on the concrete landscape walls, while it tried to fix the soil compaction problem.

Elia Aff. ¶ *9*. It took Turner over ten months to try to fix the soil problem. In September 2014, Modern was informed that it could resume installation of the remaining 110 precast panels.

Upon being notified by Turner, Modern and its pre-cast installer, Old Dominion Erectors, remobilized to the site to complete the installation of the precast panels to the landscape concrete walls. Unfortunately, the walls had shifted and were leaning because of the soil problem and the area was no longer within the contract specs. *Claessen Aff.* ¶ *10*. Modern and Old Dominion Erectors were ordered to make the panels fit on the concrete walls. As a result, Modern and Old Dominion had to prep the existing walls that were out of tolerance and fit the panels to these out of tolerance walls by trimming the thickness of panels and/or cutting the length of panels. Modern and its subcontractor Old Dominion Erectors also had to retool the connectors to meet the current as built conditions.

As instructed by Turner, Modern remediated and retrofitted 110 precast panels. These were prepared at the request of Turner to fit the new out-of-spec cast-in-place concrete walls. The work performed by Modern was extra work and the costs associated with this extra work are owed to Modern. Modern, per Article XV, of the contract submitted written contract revision 12 with supporting documentation. *Ex. I*. Turner did not object to this contract revision and, in fact, submitted the revision to its insurance company. *Ex. P at p. 5-6*. According to Turner, the insurance company paid Turner $61,000.00 against Modern's $176,090.00. *Id.* Turner offered this amount to Modern, who justifiably rejected that proposal.

Turner is arguing that Modern is not entitled to more than the $61,000.00 Turner received from its insurance company pursuant to Article IX of the contract. However, Article IX restricts recovery to what Turner recovered from the owner.

> The Subcontractor agrees that it shall not be entitled to nor claim any cost reimbursement, compensation or damages for any delay

> obstruction hindrance or interference to the work except to the extent that Contractor has actually recovered corresponding cost reimbursement or damage from the Owner under the Contract Document for such delay, obstruction, hindrance or interference and then only to the extent of the amount, if any, which Contractor on behalf of the Subcontract actually received from the owner on account of such delay, obstruction, hindrance or interference.

Ex. A at Article IX.

When reading and interpreting contract provisions, the court's purpose is to give full force and effect to the expressed or implied intentions of the contracting parties, if such can be discerned. *Truong Xuan Truc v. U.S.*, 212 Ct. Cl. 51, 66, 1976 WL 905 (1976) (*quoting Massachusetts Port Auth. v. U.S.*, 456 F.2d 782, 784, 197 Ct. Cl. 721, 726 (1972)); *see also SCM Corp. v. U.S.*, 675 F.2d 280, 283, 230 Ct. Cl. 199, 203 (1982); *Honeywell Inc. v. U.S.*, 661 F.2d 182, 186, 228 Ct. Cl. 591, 596 (1981); *Dynamics Corp. of America v. U.S.*, 389 F.2d 424, 429, 182 Ct. Cl. 62, 72 (1968). If the contract is clear on its face and not ambiguous, then the court should enforce its terms according to the plain meaning of the language used. *Covol Fuels No. 4*, 785 F.3d at 112.

Nowhere does Article IX restrict recovery to payments received from the insurance company, only to the amount recovered from the owner. Modern did not agree in any subcontract to be restricted to what Turner received from its insurance company. Per the plain meaning of the terms of the contract, Modern is not restricted to recovery of the amount Turner received from its insurer. Modern performed the work as directed by Turner. The remediation and retrofit of those panels were done at great cost to Modern, and Modern properly submitted written contract revisions pursuant to Article XV of the contract. Turner has refused to pay Modern for this extra work. Turner has breached the contract.

Turner may try to argue that Modern is not entitled to damages under Article IX's no damage for delay clause. However, this is incorrect for a number of reasons. First, this is not a delay claim. As shown above this a claim for extra work due to a soil issue that caused the cast in place concrete landscape walls to lean and move out of spec, which resulted in Modern having to remediate and retro fit the precast panels to the out of spec landscape walls.

Modern states this is a claim for extra work, however, if the court decides the damages are for delay, then Modern should still be able to recover. Damages for delay are generally available under the Miller Act. A no damage for delay clause is addressed pursuant to the law of the state. The State of West Virginia has not addressed the enforceability of no damage for delay clauses in public contracts, but many other states have addressed the enforceability of no damage for delay clauses.

The general rule in Pennsylvania is that a no-damages-for-delay clause in a construction contract will be enforced, unless the party seeking to invoke the clause interfered in a positive or affirmative manner with the contractor's work or where there is a failure on the part of the party seeking to enforce the clause to act in some essential manner necessary to the prosecution of the work. The courts have granted exceptions to this rule where there has been "active interference" by the party seeking to invoke the clause. *John Spearly Constr., Inc. v. Penns Valley Area School Dist*, 121 A.3d 593 (Pa. Comm. Ct. July 24, 2015).

In *Gasparini Excavating v. Pennsylvania Turnpike Commission*, 409 Pa. 465, 187 A.2d 157 (1963), Gasparini Excavating Co. was awarded a contract to excavate an area that was to be used for a section of the Northeast Extension to the Pennsylvania Turnpike. *Gasparini Excavating v. PA Turnpike Comm.*, 409 Pa. 465, 466, 187 A.2d 157, 158 (1963). The area had to be "slushed," or filled in, by a separate contractor before Gasparini could begin its work. *Id.* Gasparini was ordered to begin work while the slushing was still going on, which resulted in denied physical access to where Gasparini needed to work, and the company was unable to begin work for several months. *Id.* at 469-470, 159. The Pennsylvania Supreme Court held that the no-damages-for-delay clause was unenforceable because the Turnpike Commission failed to organize and administer the work according to the contract and by "interference with [Gasparini's] performance by its exclusion from the work site" after it was given notice to start operations. *Id.* at 479, 164.

Ohio has made no-damage for delay clauses unenforceable as violative of public policy when the cause of the delay is the proximate result of the owner's act or failure to act. R.C. 4113.62. Further, no-damage-for-delay clauses in the context of public construction projects are statutorily prohibited by Virginia Code § 2. 2 4335. That code provision states, "Any provision contained in any public construction contract that purports to waive, release or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent the delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control shall be void and unenforceable as against public policy." Similar to these jurisdictions, this Court should find that the no-damage-for-delay clause is against the general policy of the Miller Act and only enforceable if the delay was not caused by the actions of Turner.

Though the Northern District of West Virginia in *United States of America f/u/b/o Kogok Corporation v. Travelers Casualty & Surety Company of America*, 55 F. Supp. 3d 852 (N.D. W. Va. 2014) has enforced a no damage for delay clause similar to the one in this contract. Unlike in Kogok, here inequities and foul play exist.

On October 15, 2015, Turner settled with the FBI in the amount of $23,800,000.00 in settlement for all of its claims. *Ex. M*. The settlement offer states:

> This global settlement is inclusive of Turner's August 8 and 24, 2015 final global settlement submissions listed below, pending and approximate Liquidated Damages, all requests for Contracting Officer Final Decisions, all active or pending litigation, all outstanding liabilities, obligations, claims, and demands of whatsoever kind arising out of said Contract. Further, it is inclusive of but not limited to the following:
>
> - Project Change Orders with Part 1 Modifications,
> - Project Change Orders with Unilateral and Balance owed,
> - Pending Change Order Requests,
> - Approximate Project Change Orders
> - Impact and Inefficiencies,
> - Pending and Approximate Staff Costs.
> - Pending and Approximate Requests for Time Extensions

Id.

This claim was submitted by Turner to its insurance company and, upon information and belief, the owner in September 2015 and is thus a pending change order request and should be covered by this settlement, yet Modern has been paid nothing. *Forlenzo Aff.* ¶ *60*. Turner has an obligation both contractually under Article XXXIII of the contract (*Ex. A*), professionally and ethically to ascertain and identify the subcontractor claims as they are being settled with the government. However, Turner did not request that the final settlement change order identify and itemize all of the subcontractor claims that were being settled and resolved.

As Turner received $23,800,000.00 from the FBI based on subcontractor claims it refused to identify, Turner should be estopped from claiming it received no money from the owner for Modern's claims. Furthermore, Turner has never stated Modern's landscaping claim lacks merit and in fact submitted the claim to its insurance company. Turner never rejected Modern's claim under Article IX for delay and never even raised the issue of delay until this went into litigation.

This claim, unlike the claim in *Kogok* reeks of foul play and inequities and thus the no damage for delay clause should not be enforced.

CONCLUSION

Modern performed extra work under the contract by providing a full-time licensed surveyor for which it is entitled to be paid in the amount of $112,969.00 plus interest. Modern also performed extra work at the direction of Turner to remediate and retro fit the landscape precast panels due to the soil issues causing the landscape cast in place concrete walls to move out of spec through no fault of Modern. Modern is entitled to be paid for this extra work in the amount of $176,090.00 plus interest. This court should find in favor of Modern and award damages in the amount of 289,050.00 plus interest.

Respectfully submitted this 18th day of April, 2017.

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By Counsel:

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